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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STANFORD LAMAR FERRELL, Appellant.	)	2 CA-CR 2008-0411 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700791

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Gail Gianasi Natale — Phoenix
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Stanford Ferrell was charged with three counts of child molestation and three counts of sexual conduct with a minor under the age of fifteen. Two of the molestation and two of the sexual conduct counts involved victim A., and the remaining two counts involved victim B. A jury found Ferrell guilty of two of the molestation

counts, one involving each victim.[1] The trial court sentenced him to consecutive, somewhat mitigated terms of fifteen years' imprisonment. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asserting that, after reviewing the record, she had found "no appealable errors" and asking this court to search the record for fundamental error. Presumably as a potentially arguable issue, counsel has raised the court's denial of Ferrell's pretrial motion to sever the counts as to each victim. Ferrell has filed a supplemental brief in propria persona, arguing the prosecutor committed misconduct by knowingly proffering false testimony at trial, unduly influencing the jury by asking Ferrell "argumentative" and "demeaning" questions during cross-examination, and making inappropriate statements during closing argument. We affirm.

¶2 Generally, we review a ruling on a motion to sever for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). If, however, as here, a defendant has failed to renew a motion to sever during trial, we review the denial of the motion for fundamental error only. Ariz. R. Crim. P. 13.4(c) (motion to sever must be renewed during trial; severance "waived" if motion not renewed); *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (defendant who fails to renew motion to sever waives all but fundamental error).

¶3 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude

[1]The jury also found victim B. had been twelve years old or younger at the time of the offense.

that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20; *see also State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶4 Here, we find no error, let alone fundamental error in the trial court's decision denying the motion to sever. The court did not abuse its discretion in determining that the acts alleged against both victims would have been admissible in separate trials. *See* Ariz. R. Crim. P. 13.4(b) (defendant entitled as matter of right to severance of counts joined pursuant to Rule 13.3(a)(1) "unless evidence of the other offense or offenses would be admissible . . . [even] if the offenses were tried separately").

¶5 Following an evidentiary hearing, the trial court found that evidence of the offenses against victim B. would be admissible at a trial on the counts involving victim A. because, despite the approximately four-year gap between the acts allegedly committed against each victim, there were substantial similarities in the "alleged seduction, inducement or intended inducement" of the victims, and "the commission of the other act[s] provide[d] a reasonable basis to infer that the Defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime[s] charged." *See* Ariz. R. Evid. 404(c). The court also found that the evidentiary value of the acts allegedly committed against each victim was not "substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403," Ariz. R. Evid.

¶6 Even were we to presume the trial court abused its discretion by denying the motion to sever, Ferrell has failed to show the necessary prejudice to warrant reversal. "When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" *Murray*, 184 Ariz. at 25, 906 P.2d at 558, *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Our supreme court has stated that "a defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *State v. Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d 450, 454 (2003). The jury was so instructed in this case. Thus, we conclude Ferrell was not prejudiced by the court's denial of his motion to sever.

¶7 We also review Ferrell's claims of prosecutorial misconduct for fundamental error, because Ferrell did not object below to the prosecutor's conduct. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). "To warrant reversal, the prosecutorial misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006), *quoting*

State v. Lee, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). We find no such misconduct in this case.

¶8 Ferrell contends that because the trial testimony of one of the victims was inconsistent with his testimony given during a pretrial hearing, the prosecutor proffered false testimony. At the pretrial hearing, the victim testified that Ferrell had given him an electric scooter, ostensibly in exchange for the victim's teaching Ferrell's daughter how to ride the one Ferrell had bought for her. At trial, the victim testified that Ferrell had taken him to a storage shed before the daughter's birthday party and "presented" the scooter to him there, making the same offer. We find no inconsistency in the victim's testimony, much less any reason to believe that the trial testimony was false or that the prosecutor knew it was false.

¶9 Ferrell also contends that the prosecutor improperly cross-examined him and that the "sum total of the prosecutor's closing argument" was improper and prejudicial. Ferrell has not specified, however, which questions he believes the prosecutor improperly posed. We have reviewed the entire cross-examination and have found no misconduct. We also have found no misconduct in the prosecutor's closing argument warranting reversal. Ferrell contends the prosecutor injected his own opinion, misstated the law, mischaracterized Ferrell's testimony, and improperly appealed to the jury's emotions. But "[w]ide latitude is given in closing argument, and counsel may comment on and argue all justifiable inferences which can reasonably be drawn from the evidence." *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989). Taken in context, the prosecutor's closing remarks did not mischaracterize the evidence, misstate

the law, constitute an offer of the prosecutor's personal opinion, or appeal to the jurors' emotions. Rather, the prosecutor presented the evidence in the light most favorable to the state and argued the applicability of the law accordingly. But to the extent any of the prosecutor's remarks could be considered improper, they did not so infect the trial as to constitute prosecutorial misconduct warranting reversal.

¶10 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety for reversible error. Finding none, we affirm Ferrell's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge